APPENDIX.

REGULATIONS.

To carry into effect the provisions of the Act of April 21, 1904, (Public 125), relative to Delaware-Cherokee citizens who had made improvements or were in rightful possession of improvements in the Cherokee Nation at the time of the passage of said Act.

1. All Delaware-Cherokee citizens shall be given a preference at the Cherokee land office of the Commission to the Five Civilized Tribes, and shall be permitted to select their allotments in advance of their regular numbers. Notice of this order shall be sent immediately, by registered letter, to all Delaware-Cherokee heads of families at their last known post office address.

2. All persons listed for enrollment by the Commission to the Five Civilized Tribes as Delaware applicants for enrollment as Cherokee citizens, have the right to institute proceedings, as herein prescribed, unless said applicants have been finally re-

fused enrollment as provided by law; but no application for the benefits of the Act of April 21, 1904, shall be granted until the enrollment of the applicant as a Cherokee citizen shall be approved by the Secretary of the Interior, as provided by law for the approval of the citizenship rolls of the Cherokee Nation. Enrollment cases of this kind will be made special.

3. At the time of the selection of allotments by such Delaware-Cherokee citizens, their testimony shall be taken as to what improved land, and the improvements thereon, they were rightfully holding on April 21, 1904, in excess of the land which they and their families are entitled to take as their allotments.

4. Immediately upon the selection of an allotment by a Delaware-Cherokee citizen, the Commission to the Five Civilized Tribes shall certify to the official designated by the President, under said Act of April 21, 1904, a list of the alleged surplus holdings and improvements thereon of such citizen on the date above mentioned; and the Commission shall withhold from allotment the land upon which the improvements so claimed by the Delaware-Cherokee citizen are located until such claimant shall sell such improvements and the valuation thereof has been duly approved by the official designated for that

purpose by the President, as provided in the act of April 21, 1904.

5. When satisfactory proof of the sale of improvements by a Delaware-Cherokee citizen has been furnished the Commission to the Five Civilized Tribes and the valuation of such improvements has been approved by such designated official, the purchaser shall have the right to make application at the land office to select the land upon which the improvements are located as his allotment, and such selection of allotment shall be subject to contest proceedings regularly instituted before the Commission.

6. If any Delaware-Cherokee shall not, within ninety days from the date of notice given as required in section 1, select the allotments which he and his family are lawfully entitled to take, the Commission to the Five Civilized Tribes shall proceed to locate all the improvements claimed by such citizen to have been rightfully held by him on April 21, 1904, and shall then designate allotments for such citizen and his family as may appear to their best interests, of which the Commission will advise the Delaware-Cherokee citizen, and also of his right to sell improvements on the surplus holdings.

7. In case of conflicting claims of ownership of improvements, or of the possessory right to lands,

the same shall be received and decided by the Commission to the Five Civilized Tribes as in ordinary contest cases, such cases to be made special; but, if any applicant applies for land or improvements which are shown by the records of the Commission to be claimed by a Delaware-Cherokee citizen, said citizen shall be at once notified of such application in order that he may promptly institute contest proceedings for the protection of his rights, and such contests shall be advanced upon the docket of the Commission for the earliest possible determination. The said designated official shall be promptly advised by the Commission of the filing of the application and also of the contest, if initiated, and of its final action upon such matters.

8. While the proceedings above outlined are pending, the Commission to the Five Civilized Tribes shall withhold from selection as allotments by other Cherokee citizens, all lands which have heretofore been claimed by Delaware-Cherokee citizens.

9. If the improvements upon the surplus holdings of any Delaware-Cherokee are not sold by him within a period of six months from the date of selection of his allotment, the land upon which such improvements are located shall thereupon be thrown open for allotment as other lands of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.

APPROVED, June 1, 1904.
THOS. RYAN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR, RJH
WASHINGTON.

I. T. D. 3072-1905. March 27, 1905.
LRS

Commission to the Five Civilized Tribes,
Muskogee, I. T.

Gentlemen:

The Department is in receipt of your report dated March 20, 1905, in response to telegram dated March 16, same year, submitting such changes in the draft of regulations relative to the disposal of improvements of the Delaware-Cherokees, under the act of March 3, 1905 (Public 212), as in your judgment ought to be promulgated. You suggest that the regulations approved by the Department on June 1, 1904, be amended as follows:

"Section 4. Change the last clause thereof so as to read:

'as provided in the Acts of April 21, 1904, and March 3, 1905.'

Section 9. Change line 3 so as to read:

'from March third, nineteen hundred and five, the land upon which'."

The Department concurs in your recommendation, and said regulations are amended accordingly.

Action will be immediately taken requesting the President to designate the officer to make the valuation as provided in said act.

Respectfully,

E. A. HITCHCOCK,
Secretary.

Endorsed: Indexed. Commission to Five Tribes. No. 16472. Received Apr. 4, 1905. Answered. Book. Page. 23954-1905. Department, Hitchcock, Washington, D. C., March 27, 1905. Reports amendment in regulations relative to the disposal of improvements of Delaware Cherokees. Copy sent Cherokee Land Office April 5/05.

DEPARTMENT OF THE INTERIOR,

Office of
SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the lands of said tribes, and that the above

and foregoing are true and correct copies of the regulations of the Department of the Interior, approved by Thos. Ryan, Acting Secretary of the Interior June 1, 1904, and amendments thereto of March 27, 1905, to carry into effect the provisions of the Acts of Congress of April 21, 1904 and March 3, 1905, governing the disposition of improvements of Delaware-Cherokees.

JOE H. STRAIN,

Acting Superintendent for the Five Civilized Tribes.

Nov. 18, 1916. JRP

[illegible]

Supreme Court of the United States

OCTOBER TERM, [illegible]

[illegible] L. [illegible]AGE and [illegible] GAS & OIL COMPANY, Plaintiffs in Error,

vs.

ANNIE M. MARTIN, and ROTH-ARGUE & MOORE BROTHERS OIL COMPANY, Defendants in Error.

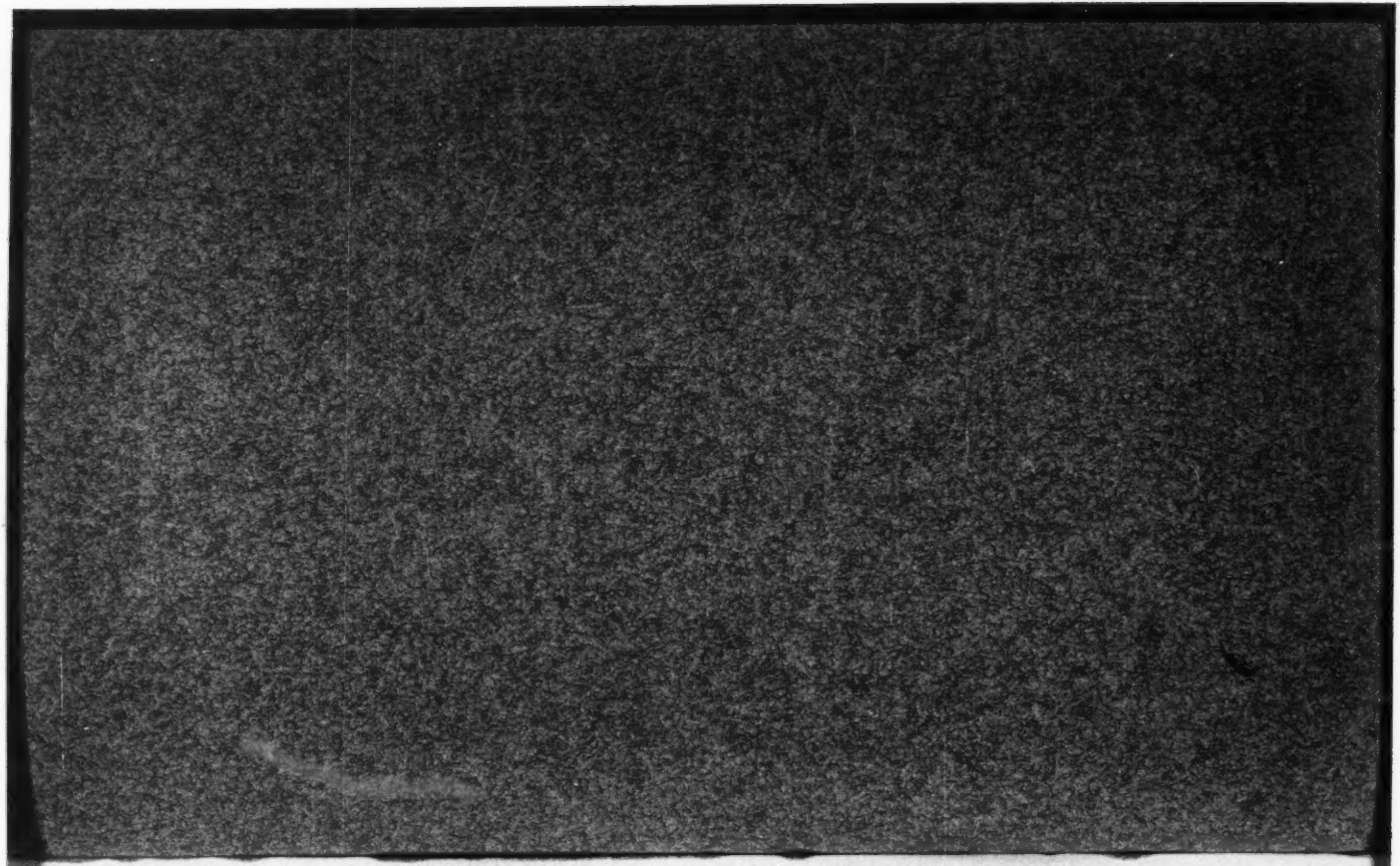
In Error to the Supreme Court of the State of Oklahoma.

BRIEF OF DEFENDANTS IN ERROR.

[illegible] J. Boone,

Attorney for Defendants in Error Annie M. Martin and Roth-Argue & Moore Brothers Oil Company.

[illegible] Printers, [illegible], Okla.



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plaintiff in error it is claimed that the court erred in holding and deciding that the plaintiff in error, Harnage, was not entitled to have trust declared in his favor in the land patented to the defendant in error Martin, by virtue of the records herein disclosing that said Harnage was owner of the improvements on said land and therefore entitled to select the same at allotment ---------- 14

That because of the fact that the land in controversy was restricted by governmental restictions at the time of the selection by Harnage and Martin, on May 13th and 26th, 1904, that the courts were without jurisdiction to try and determine the rights between the parties because of the fact that exclusive jurisdiction had been vested in the Secretary of the Interior by the Acts of Congress ---------- 17

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In the

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 112.

JESSE L. HARNAGE and DELOKEE GAS & OIL COMPANY, - - - - - - - Plaintiffs in Error

vs.

ANNIE M. MARTIN, and ROTH, ARGUE & MAIRE BROTHERS OIL COMPANY, - Defendants in Error

---

Brief of Defendants in Error.

STATEMENT OF THE CASE.

On the 27th day of December, 1910, the plaintiffs in error filed this action in the District Court for Washington County, Oklahoma, against the

defendants in error, praying principally that the defendant in error, Annie M. Martin, be decreed to hold the lands in the amended petition described in trust for the complainant Harnage and establish a resulting trust in said land in favor of the said Harnage against the defendant Annie M. Martin, and directing the said Annie M. Martin to convey all of her right, title and interest in and to said lands to the said Harnage, and in the event the said Annie M. Martin refused to do so, that a commission be appointed by the court for the purpose of making said conveyance, or that decree rendered therein declare said resulting trust stand as a conveyance of all right, title and interest of the said defendant in error, Annie M. Martin, to the said Harnage; the amended petition further prayed for an injunction and receiver (pages 3 to 626, Printed Transcript). To this amended petition the defendants in error filed separate demurrers (pages 626 to 628, Printed Transcript). The court overruled these demurrers on the 5th day of May, 1911 (page 628, Printed Transcript). The defendants filed separate answers to the amended petition (pages 629 to 659, both inclusive, of Printed Transcript), and to these answers replies were filed by the plaintiff (page 661 of the Printed Transcript). On the 26th day of October, 1911, the cause came on to be tried before the Honorable R. H. Hudson, the Judge of said court (page 662 of the Printed Transcript). At the close of plaintiff's

evidence the defendants filed their written demurrer which is set out in full at page 671 of the Printed Transcript; the grounds thereof are as follows, to-wit:

> "First: That this court has no jurisdiction of the subject matter and parties under the evidence.
>
> Second: That the evidence does not show that the decision of the Secretary of the Interior on questions of fact, awarding the lands in controversy to the defendant in error, Annie M. Martin, were induced by fraud or gross mistake.
>
> Third: That the evidence does not show that upon the facts found, conceded and established without dispute at the final hearing before the Secretary of the Interior, that the Secretary fell into clear error in the construction of law applicable to the case which caused him to issue patent to the wrong party."

That on the 28th day of February, 1912, the court rendered its decision and judgment in the case, sustaining the defendants' demurrer to the evidence and dismissed the cause. (Printed Record, page 672.) That the plaintiffs in error filed their motion for a new trial (Printed Record, page 673), and perfected appeal to the State Supreme Court (Printed Transcript, pages 674-675-676). That on the 28th day of October, 1913, the Supreme Court of Oklahoma, in an opinion by Chief Justice Hayes, affirmed the judgment of the lower court (Printed

Transcript, page 682). From said opinion and decision of the State Supreme Court a writ of error has been sued out to this court and the same now is for hearing before this court, on the motion of the defendants in error to dismiss for want of jurisdiction and upon the merits of said case.

ARGUMENT ON JURISDICTIONAL GROUNDS.

I have heretofore filed in this court and cause a brief on motion to dismiss or affirm this case, touching the jurisdictional grounds, and I shall not again reiterate what was said in that brief, but will attempt to reply to the briefs filed on behalf of the plaintiffs in error, both the brief on motion to dismiss and on the merits. I have filed with the clerk of this court certified copy of the mandate of the State Supreme Court, which has been filed in the District Court for Washington County, Oklahoma, in accordance with law, prior to the time of taking the appeal to this court and the mandate of the Supreme Court of Oklahoma, together with its file marks and endorsements, is printed in full in this brief in the appendix, and I contend that in view of the fact that the State Supreme Court had lost jurisdiction over this action, the same having been placed under the supervision and jurisdiction of the District Court, that in order to properly present the record to this court the writ of error

should run to the District Court for Washington County, Oklahoma, and as it did not run to such court, then that this court is without jurisdiction to hear and determine it, because the appeal is to reverse the judgment of the District Court.

Under the Second Proposition, that there is no Federal question involved, counsel seems to content himself by saying that in a test case between two Cherokee Indians that this court has often entertained jurisdiction of them and that therefore it would have jurisdiction in this case. Counsel has cited the case of *Ross* v. *Stewart,* 227 U. S. 530, 57 L. Ed. 626, and other cases supporting this theory. *Ross* v. *Stewart* is only applicable by analogy here, for the reason that this was a townsite contest, and while the same rule might be applicable, I am somewhat doubtful of it, but at all events, this case, it seems to me, rather more sustains the contention of the defendants in error than it does that of the plaintiffs in error. That the case, at all events, as I get it from the record in the report, was decided on the demurrer to the amended petition, which might raise a Federal question, but in the case at bar this was a demurrer to the evidence and raised the question of a *sufficiency of the evidence* to warrant the judgment for the plaintiffs in error. The lower court held that the evidence was insufficient and this ruling was followed by the Supreme Court of the State. The only question that the State Supreme Court examined was the ques-

tion of *sufficiency of the evidence.* It agreed with counsel on his proposition of law, that is, that the party owning the improvements was entitled to preference right of filing on the particular tract of land. Although I contend that the State Supreme Court had no jurisdiction to set aside the patent, unless they brought themselves clearly within this rule: First, that the evidence as set forth in the record shows that the decision of the Secretary of the Interior on the question of fact was induced by fraud or gross mistake, and, second, that the record of the evidence shows that upon the facts found, conceded and established without dispute at the final hearing before the Secretary of the Interior, that the Secretary fell into clear error in the construction of the law applicable to the case, which caused him to issue patent to the wrong party. Third, that the court had jurisdiction of the parties and subject matter of the action.

ARGUMENT ON MERITS.

First Proposition.

The plaintiff in error contends that the only circumstance which would uphold the validity of the claim of the defendant in error, Annie M. Martin, against the said Harnage for this land was the fact that at the time the lands were selected by Harnage, Annie M. Martin was the owner of the improvements on the tract. As a matter of law I dispute the principal contended for by counsel that had

Harnage made prior selection and had Annie M. Martin no right whatever to this land except her general right as a Cherokee citizen, still that the Department under the wide discretion allowed it, by Acts of Congress would have had the right to have allotted same to her in preference to Harnage or anyone else; in other words, it was a *discretionary act* which the Secretary of the Interior alone was the sole judge.

In what is commonly known as the Cherokee Agreement, the same being "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Townsites Therein, and for Other Purposes" (32 St. L. 716), Bledsoe's Indian Land Laws, Section 510, reads as follows:

> "Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes under the direction of the Secretary of the Interior to determine all matters relative to the appraisement and the allotment of lands."

Under this section there can be no doubt that where two parties attempt to select the same tract of a public domain, neither of them owning any of the improvements thereon, that the Commission to the Five Tribes, with the approval of the Secretary of the Interior, could allot the same to either one of said citizens without regard to whether one was prior in time to the other or not. In this case there is absolutely no evidence whatever of the

plaintiff in error owning any of the improvements as against the defendant in error, and only seeks to hold the same under the first proposition by virtue of his prior selection. In other words, if two citizens appeared at the Land Office, one on the first day of the month, and the other on the tenth, both asking the right to select a certain tract of land of which neither of them had any possession or improvements, under Section 22 of the treaty above quoted, the Commissioner to the Five Tribes, with the approval of the Secretary of the Interior, would have the right to allot the land to either of the parties, without regard to the one making the prior selection. And when I make this assertion, I am not unmindful of the fact that the Department, on some occasions, has awarded the land to the party making the prior selection, but I say that it is a matter of such absolute discretion vested in the commission of the Five Tribes, with the approval of the Secretary, that if he chooses to allot the lands to some other person, neither of whom own any improvements on it, that the mere fact that some citizen had already filed upon it would not have any effect with the right or the authority of the Commissioner to allot the same to the party who made the last selection. There is no question but what the selection made by Harnage was prior in point of time to the selection made by Annie Martin, but there is a question that Harnage did not make the first selection on this land in contro-

versy, because it was originally selected by Wallace Thursday on May 5, 1904, eight days prior to the time that Harnage made his selection, as is shown at page 336 of the Printed Record.

Owner of Improvements.

It will be noted from a careful analysis of the propositions announced by the plaintiffs in error that they make the test as to who was entitled to the tract of land at the time of the selection, to be the owner of the improvements on the tract, and therefore it will be necessary for us to determine from the law and the record in the case as to who was the owner of the improvements on the tract of land in controversy at the time of the selection. In order to determine this question it will be necessary for us to examine into the law to ascertain whether or not this court will weigh the evidence offered to the Secretary of the Interior and to the State Supreme Court, or whether the findings of the Secretary of the Interior on the questions of fact would be conclusive on the courts, and lastly whether or not the finding of fact by the State Supreme Court is subject to review here. This court in an early decision, and which is one of the leading cases—*Calhoun* v. *Violet*, 173 U. S. 60, 43 L. Ed. 615, states:

> "It will not, in the absence of fraud, reexamine a question of pure fact, but will consider itself as bound by the facts as decided

by the Land Department in due course of regular proceedings had in the lawful administration of the public lands."

There is not one scintilla of evidence offered in this record of any fraud perpetrated by anyone on the Commission to the Five Tribes, or upon the Secretary of the Interior, that caused him to make the finding of facts herein. This being true we must then look alone to the facts as found by the Land Department on the question of whether or not Annie M. Martin was the owner of the improvements on the land in controversy. I respectfully call attention to the finding of fact made by the Department:

> "* * * * That the contestant, through her grandmother, had been in possession of the land in contest since the year 1899. The contestee had never acquired any right to the improvements. * * * Nor has he ever been in possession and his right to be awarded the land in controversy arose solely upon his prior filing." (Record, page 602.)

On page 616 of the printed transcript the Department made the further finding of fact:

> "The Department concludes that the contestant Annie M. Martin became a part of the Thursday family in early childhood and that she continued to be such until her marriage in 1898. Part of this time it is true her residence with the family was constructive only, but throughout the whole of that period she was

undoubtedly, in legal contemplation, a member of that family. * * * * But the claim of Annie M. Martin to share in the land held by the Thursday family did not rest alone on the fact that she resided on a portion of such land and made her home thereon. The payments due her as a member of the tribe and as heir of her father were actually made to Mary Thursday as head of the family. This is important, because it is evidential that the home of the latter was also the home of Annie M. Martin and for the further reason that it tends of itself to show that the said home was maintained and made possible by both. That Annie M. Martin had an interest in the Thursday holdings, considered as a whole, was apparent, not only from her own testimony, but also from that of others. * * * * The Department found, however, that after the northern portion and the southern portion were merged into one place, there was a recognized community of interests among the members of the family, growing out of their relationship and mingling of their funds, whereby each had an interest in every part of the family holdings. It follows, then, that when Sam Bob elected to take his allotment in the northern part of the place and Mary Thursday to take hers in the southern part, they impliedly relinquished to the contestants, that is, the remaining Indian members of the family, their interests to the tract lying between their allotments. * * * As she was the principal owner of the improvements on the place it must be held that she remained in possession through the other members of the place who remained thereon. * * * Her father undoubtedly had possessionary interest at his death, which passed by inheri-

> tance to his child. * * * * But as to the claim of Mr. Harnage, the Department holds that prior application profits him nothing, for the contestant's interest in the land was of earlier origin. * * * * Her interest in the land is not only greater than that of the contestee, but also of prior origin. * * * On the other hand, the Department is thoroughly convinced that the contestee's claim is purely speculative and without merit * * * * that he has permitted himself to be a party to a series of transactions which were morally wrong."

As I have before stated, in view of the fact that fraud is not charged nor proved in this case, and the Secretary of the Interior having made the finding of fact, among others, that Annie M. Martin was the owner of the improvements upon the land in controversy, naturally the plaintiff in error's contention must fail, because under the rule announced in *Calhoun* v. *Violet*, the court will not re-examine the questions of fact. The proposition which I feel that is absolutely decisive of the case at bar is the question that the State Supreme Court, having found as a fact that the improvements upon the tract of land in controversy belonged to Annie M. Martin, one of the defendants in error, and that this court is bound by the findings of fact of the State Court on a writ of error from this court to the State Court.

This court has laid down the doctrine, "In a case coming from a State Court, we do not review

the questions of fact, but accept conclusions of the State tribunal as final."

Cristman v. *Miller,* 197 U. S. 319, 49 L. Ed. 772.

King v. *West Virginia,* 216 U. S. 100, 54 L. Ed. 401.

By reference to the opinion of the State Supreme Court (page 688, Printed Transcript), it will be found that the following findings of fact were made:

> "That a careful review of the evidence before the Secretary of the Interior, we are of the opinion that it is sufficient to establish that the defendant had such interest in the improvements upon the land in controversy as entitled her, under the provisions of the statutes above referred to, to select these lands as her allotment. Plaintiff does not claim that he ever acquired this right from her or that she ever conveyed it to others."

If this case had been tried before statehood the appeal from the lower court would have gone to the Circuit Court of Appeals and from that court then to this one, and on an appeal of this character this court, under the first proposition herein announced, would not have had the right to review the evidence in this case except for fraud or gross mistake of facts; but since the case was tried after statehood and the appeal then went

to the State Supreme Court, then this court is absolutely bound by the findings of fact in the State Court, as you have already held. Counsel attempts in his brief to argue to this court the sufficiency of the evidence and a great portion of his brief is devoted to copying the evidence in the record. So firmly am I imbued with the idea that this court on an appeal of this character will not consider the sufficiency of the evidence, but will accept the conclusions of the State tribunal on the questions of fact involved, that I shall not attempt to reply to that part of the argument.

Under the second assignment of error raised by the plaintiffs in error, it is claimed that the court erred in holding and deciding that the plaintiff in error, Harnage, was not entitled to have a trust declared in his favor in the land patented to the defendant in error Martin, by virtue of the records herein disclosed, that said Harnage was the owner of the improvements on said land and therefore entitled to select the same in allotment. On the question of fact the same thing would apply in answer to this proposition as applies in the answer to the first proposition, that the finding of fact of the Secretary of the Interior was conclusive on the court in the absence of fraud; the Secretary of the Interior has found as a fact that the improvements on the tract of land in controversy belonged to Annie M. Martin. It is now contended by the plaintiff in error that the improvements on said tract

of land belonged to Wallace Thursday in his own right, as a Delaware Cherokee citizen, and also in his right as guardian of Mary Thursday, an insane person, and Sam Bob, a minor, all of whom claim to be Delaware Cherokee citizens; it is contended that because of the Secretary's error of law in not hearing the petition of the said Wallace Thursday in his own behalf and as guardian of Sam Bob, a minor, and Mary Thursday, his insane wife, that the Secretary made an error of law, and that if he had not made this error of law the improvements on said tract of land would have belonged to the said Harnage; under the regulations set forth in the appendix to Counsel's Brief it appears that at the time of selection of allotments by the Delaware Cherokee citizens, their testimony was to be taken as to what improvements thereon they were holding on April 21, 1904, in excess of the land which they and their families are entitled to take as their allotments, and if the Secretary of the Interior found as a fact in hearing the evidence in the Mary Thursday and Sam Bob case, at the time when their allotments were made, that the tract of land in controversy belonged to Annie M. Martin, I am at a loss to understand how the matter could have been changed by the Secretary of the Interior setting down for hearing a special petition filed by Wallace Thursday and Sam Bob, besides these petitions were withdrawn by Sam Bob after

he became of age and by Wallace Thursday as guardian of Mary Thursday, his insane wife.

Suppose for the sake of argument that the Secretary of the Interior had set down the petition of Sam Bob and Mary Thursday to sell the improvements on certain Delaware-Cherokee surplus lands and had found in the course of the hearing as a fact that the improvements were not owned by the petitioners, Sam Bob and Mary Thursday, but were owned by Annie M. Martin; clearly it would not then be contended that they would have any right to make a transfer or have anything to transfer. Then if that were true, suppose in other proceedings, the Secretary of the Interior found as a fact that the improvements upon a certain tract of land belonged to Annie M. Martin; if the improvements belonged to Annie M. Martin they certainly could not belong to Sam Bob and Mary Thursday, as the finding of one excludes the other; so, after all, this last question raised by counsel goes back to the original question and if the Secretary of the Interior and the courts have found as a fact that the improvements upon said tract of land were the property of Annie M. Martin at the time of the selection in controversy, this court in this action won't review those findings of fact.

These defendants announce that there are two questions outside of those heretofore argued in the reply to the plaintiff in error, that the defen-

dants in error believe are conclusive against the right of the plaintiff in error to recover in this action and these propositions are as follows:

(1) That because of the fact that the land in controversy was restricted by governmental restrictions at the time of the selection by Harnage and Martin herein on May 13th and May 26th, 1904, that the courts were without jurisdiction to try and determine the rights between the parties because of the fact that exclusive jurisdiction had been vested in the Secretary of the Interior by Acts of Congress.

(2) That the plaintiff in error, as appears from the allegations of their complaint and the evidence offered, did not come into court with clean hands, and therefore the bill did not contain any equity.

In the first proposition, while it is admitted that the patent to Annie M. Martin did not issue until the year 1909, still, when said patent did issue, it related back to the inception of the right, that is, the *date of filing*, and in order for Harnage to recover he must have been entitled to recover at that time, and therefore for the purpose of argument on this proposition the date of May 26, 1904, must be taken to be the date of inception of the title, and we now ask the court and counsel this question, whether or not the courts would have had the power and jurisdiction to hear and determine this question had the action been filed shortly after May 26, 1904, and if the court at that time would not have had jurisdiction; certainly the court did

not in 1910, six years later, when the action was filed.

Section 15 of the Cherokee Treaty, 32 St. L. 716, provides as follows:

> "All lands allotted to members of said tribe, except such land as is set aside to each for homestead as herein provided, shall be alienable in five years after the issuance of patent."

Section 14 of the same treaty provides as follows:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act."

This selection was made, as I have stated, on May 26, 1904 (page 8 of the Printed Transcript). The patent to the land was issued and approved on April 13, 1909 (pages 654-655-656 of the Printed Transcript). Therefore, at the time selection was made the lands were under governmental restrictions. Annie M. Martin was a full-blood Cherokee descendant of the Delaware people, although upon the approved rolls she appears as a half-breed (page 613 of the Printed Transcript). The five-year period from the ratification of the Cherokee Treaty did not expire until August 8, 1907, there-

fore on that date was the first time that restrictions were removed from the surplus allotments of Cherokee Indians and long prior thereto the rights of Harnage, if any he had, had already accrued. Supposing for the sake of argument that the patent in this case had issued during the year 1906, and immediately after the issuance of patent Harnage had brought action to have Annie M. Martin declared to hold this tract of land in trust for his use and benefit; and suppose further that the court had made a decree finding in Harnage's favor and required Annie M. Martin to deed and convey the land to him, bearing in mind all the while that these lands were restricted until at least August 8, 1908. What would have been the effect of the court's decree requiring Annie M. Martin to convey to Harnage; that is, would Harnage have acquired a valid title to the tract of land, assuming that the proceeding as between Annie M. Martin and Harnage in the courts were ordinarily regular? It is clear to my mind that the decree would have been an absolute nullity because in violation of the treaty and the Acts of Congress. Then if the title would have been void because of governmental restrictions, is it not true that the court was absolutely without jurisdiction to make and enter any order in this case? As the action now stands, the sustaining of the demurrer to the evidence was in fact equivalent to a finding that the court did not have

jurisdiction and that was one of the grounds of the demurrer to the evidence.

The second proposition to which I care to call the attention of the court is *that the plaintiffs in error did not come into court with clean hands and therefore are in no position to ask a court of equity to grant them relief.* Attached to plaintiff's amended petition is an exhibit which is made part of his case, and this same exhibit is also offered in evidence, and in that exhibit I call the court's attention to the finding of fact made by the Secretary of the Interior in regard to the plaintiff in error Harnage's conduct before the Department in the matter of this allotment. The Secretary of the Interior found:

> "The Department is thoroughly convinced that the contestee's claim (Harnage) is purely speculative and without merit; that he has at best but a naked paper title to the land unsupported by any right or equity, and that he has permitted himself to be a party to a series of transactions which were morally wrong." (Page 620, Printed Record.)

The plaintiffs are bound by the evidence which they offered and they have offered this record in evidence in which the Secretary of the Interior has made the finding of fact that the plaintiff in error Harnage had permitted himself to be a party to a series of transactions which were morally wrong.

"The most direct application of the maxim

is the uniform refusal of equity to assist one seeking its aid to enforce or to carry to fruition a contract or transaction in which he has been guilty of conduct wrongfully towards his adversary, so as to obtain the benefit of a fraud perpetrated upon him. Nor will equity assist one in obtaining the fruits of an act which is illegal, or even enable him to gain from an act which is unconscionable. One may be barred from relief by misconduct with reference to the suit itself." 16 Cyc. 144.

Creath v. *Simms*, 5 How. 193, 12 L. Ed. 110.

RESUME.

And now in conclusion, I respectfully submit to the Court that this case should be affirmed, because:

(1) This court is without jurisdiction to hear and determine the matter:

(a) The lands in controversy were under the exclusive control of the Secretary of the Interior at the time of selection.

(b) There is no Federal question involved. the State Supreme Court having decided the case purely on the question of the sufficiency of the evidence.

(2) For want of equity in the amended petition and evidence.

(a) For failure of the plaintiffs in error to come into court with clean hands.

(b) The facts found by the State Court, which are conclusive on this court, show that Annie M. Martin was the owner of the improvements upon the land in controversy and therefore under the Acts of Congress entitled to allot the same.

Respectfully submitted,

ROBT. J. BOONE,
Attorney for Defendants in Error,
Tulsa, Oklahoma.

W. L. MCKENZIE,
of Counsel, Lima, Ohio.

APPENDIX.

STATE OF OKLAHOMA, SUPREME COURT. } MANDATE.

Jesse L. Harnage and Delokee Gas & Oil Company, Plaintiffs in Error,
vs.
Annie M. Martin and Roth-Argue Maire Brothers Oil Company, Defendants in Error. } No. 4284.

To the Supreme Court of Oklahoma:

To the Honorable Judge of the District Court of Washington County, in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did at the September, 1913, term hereof, on the 28th day of October, 1913, make an order in the above entitled cause, appealed from the District Court of Washington County, affirming the judgment of the lower court in said cause,

Now, therefore, you are hereby commanded to cause such execution to issue and further proceedings to be had herein as shall accord with said opinion and right and justice in the premises.

Witness, the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma, this 23rd day of December, 1913.

W. H. L. CAMPBELL, *Clerk.*
[SEAL] By JESSIE PARDOE, *Deputy.*

State of Oklahoma, Washington County.

I, T. H. REEVE, JR., Court Clerk in and for the County and State aforesaid, do hereby certify the above and foregoing to be a full, true and com-

plete copy of the Mandate, Case No. 1251, Jesse L. Harnage and Delokee Gas & Oil Co., Plaintiffs in Error, vs. Annie M. Martin, et al, Defendants in Error, as the same appears on file and of record in my office.

Witness my hand and seal this 18th day of September, 1916. T. H. REEVE, JR., Court Clerk.
By FALLIE QUAID.

ENDORSED:

Filed December 24, 1913, L. C. Pollock, Clerk, District Court, Washington County, Oklahoma.